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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILIP WALKER ROSATI,

Defendant and Appellant.

B145156

(Super. Ct. No. SA 028881)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Leslie W. Light, Judge. Affirmed.

David Joseph Macher, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Philip Rosati appeals from the judgment entered after his conviction by jury of first-degree murder of his second wife Franceska. (Pen. Code, §§ 187, subd. (a), 189; all further undesignated section references are to the Penal Code.) The jury rejected a special circumstance allegation that Rosati committed the murder for financial gain. In a bifurcated hearing, the trial court found Rosati had two prior strike/serious felony convictions. (§§ 667, subds. (a)-(i).) The trial court imposed an aggregate 80 years-to-life sentence: 25 years-to-life for the murder, tripled to 75 years-to-life under the three strikes law, and a consecutive 5 years for the prior serious felony convictions, which had been tried together.

After relieving his first appointed and different retained counsel, Rosati represented himself at trial. On appeal, Rosati, through appointed counsel, contends the trial court prejudicially erred in (I) changing his second appointed advisory counsel to standby status; (II) admitting evidence that Rosati committed domestic violence against his first wife Karen; (III) admitting some photographs of Franceska; and (IV) instructing the jury. Regarding the instructions, Rosati claims the trial court (A) erred in not giving additional proximate cause instructions sua sponte (CALJIC Nos. 3.40, 3.41 (6th ed. 1996; all further undesignated CALJIC references are to the 6th ed.)); (B) misinstructed on voluntary intoxication (CALJIC No. 4.21) and failed to instruct on involuntary manslaughter; (C) erred in rejecting his proffered voluntary manslaughter instructions; (D) misinstructed the jury regarding the prior domestic violence evidence (CALJIC No. 2.50.02 (2000 rev.)); and (E) erred in giving the jury misconduct instruction (CALJIC NO. 17.41.1 (1998 new)). Finally, Rosati claims cumulative error compels reversal.¹

¹ We denied Rosati's requests to represent himself on appeal, relieve his appointed appellate counsel, and file his own pro per supplemental briefs.

We reject Rosati's contentions and affirm the judgment.

FACTS

About 9:00 a.m. on April 20, 1997, Andrew Thomas, Francesca's 15 year-old son, found his mother dead in her bed in the bedroom she shared with Rosati. When Thomas went to bed shortly after 10:00 p.m. the night before, Rosati and Francesca were arguing. When Thomas awoke on April 20, Rosati was gone. Rosati was with Francesca when she died. Rosati fled out of state, abandoning one of the family's cars, renting a car which he abandoned in Texas, and making arrangements to access Francesca's remaining money. When Rosati learned authorities were pursuing him, he returned to California, but was arrested before turning himself in. These facts were undisputed. The prosecution argued Rosati, an admitted drug seller/addict and felon, murdered Francesca for financial gain as the culmination of a failing marriage, fled, and was caught while continuing to try and elude the police. At trial, Rosati testified he discovered Francesca not breathing and without a pulse from self-inflicted heroin ingestion, revived her, fell asleep, awoke to find her dead, and fled, fearing he would be accused of killing her. Rosati claimed he returned to California intending to turn himself in, but was arrested before he could do so.

Francesca married Rosati while he was in prison for robbery. After his release, Rosati moved in with Francesca and Thomas. While Rosati was employed, he continued to use heroin regularly, using up much of Francesca's financial reserves received as an inheritance from her father. The couple argued regularly about Rosati's heroin addiction. Francesca complained that Rosati hit her two times during these arguments. Once, Francesca took heroin herself to show Rosati the problems associated with living with a drug abuser. Francesca worked regularly. She was depressed, but not suicidal. Thomas'

and Rosati's relationship became strained. In the weeks before her death, the couple's relationship deteriorated. Francesca reported she was considering divorce. Rosati quit his job.

Investigators responding to Thomas' 911 call found Francesca's nude body on her back in bed, underneath an afghan and on top of a slightly bloody towel. Rigor mortis and unresponsive blood pooling in Francesca's body indicated she had been dead several hours and had not been moved after death. Francesca's external genitalia were discolored and bruised. When turned over, Francesca's body disclosed the initials PR carved lightly into her left buttocks. The tiny amount of blood suggested the initials were carved after Francesca died. Otherwise, Francesca's body displayed no visible trauma. The bedroom was undisturbed, nothing was missing, the family dog had not barked during the night, and there were no signs of a struggle. Investigators found two extra-strength acetaminophen capsules near the body, and a lighter and cigarette ashes on the bed. Other than one pillow found on a sweatshirt, the bedding was undisturbed. Investigators found an inside-out pair of red sweat pants on the floor at the foot of the bed. Investigators also recovered several rolls of film, some of which contained photos of Francesca both before and after death, Francesca's diaries, and financial data.

At the time of her death, Francesca stood five feet, five inches tall, weighed 118 pounds, and possessed good health, with no chronic health problems. She had no injection sites or track marks on her arms, negating recent or chronic drug abuse. However, Francesca's autopsy disclosed a potentially lethal dose of free morphine in her blood. Heroin almost immediately begins to metabolize into free morphine after injection into a living person. Thus, Francesca was alive when the heroin was injected. The coroner found no injection sites during the autopsy, but only looked for them on

Franceska's arms. After the body was cremated, the coroner used autopsy photos to opine that four small red welts on Franceska's buttocks could have been injection marks. Normally, death caused by a heroin overdose results from slowed metabolism that leads to pulmonary edema, fluid buildup in the lungs from which the person essentially drowns. Franceska had only slight pulmonary edema, inconsistent with death from a heroin overdose.

The coroner opined that Franceska died from asphyxiation caused by compression of her face and neck, most likely caused by suffocation through use of a soft object like a pillow. While there was no definitive evidence of strangulation, strangulation often does not leave visible neck trauma. Franceska also had small abrasions on the right cheek, a bruised tongue, and an internal lip cut, all consistent with asphyxiation by suffocation. Inside her neck, Franceska had significant hemorrhaging to the sternocleidomastoid muscle, also consistent with heavy neck pressure. Franceska's body bore no signs of attempted resuscitation.

Two defense experts opined that a heroin overdose sometimes causes rapid heart failure, causing rapid death without the normal amount of pulmonary edema, and that Franceska's other injuries might have been caused by attempted resuscitation.

Additional facts are set out in the relevant discussion sections.

DISCUSSION

I

Rosati originally was represented by the public defender. Rosati discharged the public defender and hired retained counsel. When the prosecution amended the information to add the special circumstance allegation, retained counsel withdrew with

Rosati's agreement. The public defender was reappointed, but declared a conflict because Rosati reportedly attacked other public defender clients in jail while awaiting trial. When the alternate public defender also declared a conflict, Judge Neidorf, who handled Rosati's case during much of its pretrial phase, appointed Steven Hauser, an experienced capital criminal defense lawyer.

Judge Neidorf denied several motions by Rosati to substitute different appointed counsel, finding no conflict and Hauser's representation adequate. (*People v. Marsden* (1970) 2 Cal.3d 118.) Later, Judge Neidorf granted Rosati's pretrial motion to represent himself. (*Faretta v. California* (1975) 422 U.S. 806.) However, Judge Neidorf denied Rosati's motion to act as co-counsel with Hauser. Without objection, Judge Neidorf then appointed Hauser advisory counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1106.) Rosati concedes these rulings were correct. Before trial, the case was transferred to Judge Light, who presided over the remaining pretrial proceedings and trial.

Rosati continued to complain about Hauser's performance. Rosati repeatedly made clear he wanted Hauser off the case, but did not want to be without some legal advice. Rosati repeatedly asked for appointment of different advisory counsel, but also repeatedly affirmed he wanted to represent himself. At one point, Rosati went to a third judge to try and engineer Hauser's removal. The third judge returned the case to Judge Light, who again refused to relieve Hauser or appoint different counsel. However, Judge Light relieved Hauser of his advisory status and appointed him standby counsel.

During trial, the prosecution objected to Hauser's consulting with Rosati. Judge Light inquired and Hauser confirmed he was answering Rosati's questions and providing him advice on trial tactics. Hauser continued to do so for the rest of the trial.

Both before and during trial, Rosati filed a plethora of motions, including various motions to dismiss, discovery motions, and various evidentiary motions. Rosati extensively questioned both his own and the prosecution witnesses. Judge Light repeatedly commented on Rosati's intelligence, although he also noted Rosati sometimes had difficulty asking clear questions and sometimes elicited incriminating testimony. However, Rosati defeated the financial gain special circumstance, thus eliminating a possible death sentence.

Rosati contends Judge Light prejudicially erred in changing Hauser's status from advisory to standby counsel. Rosati argues he somehow would have consulted more with Hauser than he did, and would have been more focused and effective in his defense. Rosati suggests the error is reversible per se, but argues it was prejudicial under either the *Chapman* or *Watson* standard. (*Chapman v. California* (1967) 386 U.S. 18, 36; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The contention lacks merit.

"A criminal defendant has no right both to be represented by counsel and to participate in the presentation of his own case. [Citation.] As such an arrangement is generally undesirable, a court may authorize it 'only upon a "substantial" showing that it will promote justice and judicial efficiency in the particular case.' [Citations.]" (*People v. Barnett, supra*, 17 Cal.4th at p. 1106.)

"A criminal defendant does not have a right to simultaneous self-representation and representation by counsel. [Citations.] '[N]one of the "hybrid" forms of representation, whether labeled "cocounsel," "advisory counsel," or "standby counsel," is in any sense constitutionally guaranteed.' [Citation.]

"[The California Supreme Court] ha[s] observed that the powers and responsibilities attendant upon the representation of a person criminally accused never

should be conferred jointly and equally on the accused and the attorney. ‘Rather, in all cases of shared or divided representation, either the accused or the attorney must be in charge. Stated otherwise, at all times the record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both at once.’

[Citations.]

“When a defendant chooses self-representation, he or she retains primary control over the conduct of the case, and consequently the role of advisory counsel is limited.

[Citations.] The court retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate. [Citations.] In addition, as described

above, a defendant’s right to conduct his or her own defense is subject to the proviso that he or she must abide by the rules of procedure and courtroom protocol. [Citation.]”

(Emphasis added.) (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368-1369.)

The trial court has discretion, even in a capital case, whether to appoint advisory counsel for a self-represented defendant. Only if the court fails to exercise discretion by per se denying advisory counsel where doing so was an abuse of discretion is erroneous denial of advisory counsel reversible per se. (*People v. Crandell* (1988) 46 Cal.3d 833, 861-863; *People v. Bigelow* (1984) 37 Cal.3d 731, 742-746.) Here, of course, Rosati always had counsel to assist him with his self-representation. Rosati’s complaint is that Judge Light somehow limited the nature and extent of his ability to consult with Hauser. (See *People v. Lawley* (2002) 27 Cal.4th 102, 148-151 [no abuse of discretion for trial court to refuse to end defendant’s self-representation with advisory counsel at penalty phase].)

Judge Light did not abuse his discretion. Hauser consulted with Rosati throughout the trial, answering his procedural questions and advising him on trial tactics. Rosati

offers only speculation about what additional advice Hauser might have offered under different circumstances, and the effect that advice might have had. Rosati repeatedly tried to alter the form of his representation, trying to keep control of the case to himself while demanding legal help from someone other than Hauser. The court did not abuse its discretion in putting minimal limits on Hauser's interactions with Rosati.

In addition, Rosati suffered no harm under any standard. Rosati heavily litigated his case, presented a coherent defense supported by expert witnesses, and defeated the special circumstance allegation. We reject his speculative claim that, although properly self-represented, he somehow would have done better had he had more unspecified help from Hauser.

II

Before trial, the prosecution, over Rosati's objection, moved to admit evidence of Rosati's previous domestic violence against Franceska in December 1996 and against Karen in 1982. (Evid. Code, § 1109.)² Judge Light held a hearing. Judge Light admitted the evidence. Because Rosati was in prison for much of the period between 1982 and the earlier incident against Franceska, Judge Light ruled evidence of his attack on Karen was not absolutely barred by the 10-year period proscribed in Evidence Code section 1109, subdivision (e). Because the evidence showed he had choked Karen and either strangled or suffocated Franceska, Judge Light found the evidence more probative than prejudicial. (Evid. Code, § 352.)

Karen and Rosati were high school sweethearts, married in 1979, had two children, finally separated in late 1982, and divorced in 1989. Karen obtained a

² On appeal, Rosati concedes the court properly admitted the evidence involving Franceska.

restraining order when the couple finally separated. Karen admitted the couple argued frequently, including mutual slapping and hitting. The couple periodically separated and reconciled. The incident at issue began in early 1982. Rosati had been out all night. When he returned, he and Karen began arguing about some leftovers. When Rosati threatened to leave with the baby, Karen grabbed a kitchen knife. Rosati kicked her in the chest and groin area. Karen and the children left to go to her mother's house.

When Karen returned a few days later, the couple was sitting on the couch and talking. Karen said she did not want to reconcile because of Rosati's continued drug abuse, failure to work, and temper. According to Karen, Rosati then grabbed her throat and squeezed. Karen briefly lost consciousness. When she awoke, Rosati was asleep. Karen left. Her neck was red and marked. The couple reconciled a few days later. Karen apparently did not report this incident.

A few months later, Rosati nearly broke Karen's finger during an argument. Karen reported this incident to the police. The final separation followed. Karen claimed Rosati telephoned her a few months before her testimony and apologized.

Rosati and his two sisters, both of whom were Karen's former friends and knew the couple throughout their marriage, testified Rosati never choked Karen, and only hit or held her in self-defense. The defense evidence showed Karen was the aggressor, with a violent temper.

Judge Light repeatedly instructed the jury that it had to determine whether the incidents happened, and if so, they could not convict Rosati based on that evidence alone.

Rosati contends the trial court prejudicially abused its discretion in admitting the challenged evidence. Rosati argues the evidence was remote, unreliable, and insufficiently similar to justify its admission. The contention lacks merit.

As relevant, Evidence Code section 1109 provides: “(a)(1) Except as provided in subdivision (e) . . . , in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶] (c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law. [¶] . . . [¶] (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice. [¶]”

“ . . . The admissibility of evidence of domestic violence [under Evidence Code section 1109] is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion. (Evid. Code, §§ 352, 1109; [citation].)

““The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]’ [Citation.]” (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Although subdivision (e) made the evidence presumptively inadmissible, the trial court correctly noted Rosati was in prison for most of the time between the 1982 incident

with Karen and the late 1996 incident with Franceska. The trial court reasoned his incarceration prevented Rosati from being in situations where domestic violence was possible. Rosati committed the two incidents both shortly before and shortly after his imprisonment. The trial court reasonably concluded this chronology sufficiently overcame the 10-year period in subdivision (e).

In addition, both attacks involved using hands to stop the victims' breathing. We reject Rosati's argument that because one incident involved strangulation and the other asphyxiation by pressing down on the victim, they are too dissimilar. Karen was awake and talking when attacked, while Franceska was lying unconscious. The trial court did not abuse its discretion in finding the incidents sufficiently similar to warrant their admission.

Likewise, we reject Rosati's claim that because the incident with Karen did not result in conviction, it was less probative and reliable. Domestic violence frequently goes unreported. Moreover, Karen testified without contradiction that she secured a restraining order upon the couple's final separation, providing some corroborating evidence of her testimony. In addition, the lack of a conviction made it easier for Rosati to present evidence impeaching Karen's account of the marriage. Indeed, Rosati presented much evidence supporting his theory that he was never abusive in either marriage, and that Karen was the aggressor. The trial court did not abuse its discretion in admitting the challenged evidence.

Again, Rosati suffered no harm. The court repeatedly instructed the jury it first had to determine whether the 1982 incident happened, and, if so, could not convict Rosati on that finding alone. Moreover, the 1982 incident was far less violent, and thus far less prejudicial, than the crime for which Rosati was on trial.

III

The prosecution introduced dozens of photographs of Francesca, including autopsy and crime scene photos, photos developed from a camera found in the house depicting her nude, and photos of her alive with Thomas. Before trial, Rosati filed a written motion demanding discovery and a hearing, challenging all the photos on Evidence Code section 352 and relevance grounds. Judge Light held hearings regarding the photographs, admitting many and excluding others.

On appeal, Rosati challenges the admission of several of these photos: two showing Francesca in life, with Thomas, taken within two years of her death; an autopsy photograph showing a close-up view of Francesca's upper chest and shoulder muscle; nine crime-scene photos of Francesca's dead body, showing various angles and Rosati's initials carved into her buttocks, and two photos developed from the camera found at the home, both showing Francesca nude, one with a hair brush inserted into her vagina, and one with a man's penis near her mouth. The parties disputed whether Francesca was dead when the last two photos were taken.

Rosati argues Judge Light prejudicially abused his discretion in admitting the challenged photos. Rosati argues they were inflammatory, cumulative, and more prejudicial than probative, and the error was prejudicial. The contention lacks merit.

“The rules pertaining to the admissibility of photographic evidence are well settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible, unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ The test of relevance is whether the

evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]” (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

Where relevant, photos of the victim while alive are admissible (*People v. Osband* (1996) 13 Cal.4th 622, 676-677), as are crime scene photos of the victim (*People v. Hughes* (2002) 27 Cal.4th 287, 336-337), and victim autopsy photos. (*People v. Welch* (1999) 20 Cal.4th 701, 750-751.)

The crucial issue in this case was the cause of Francesca’s death. The prosecution argued Francesca was a healthy, non-drug user, who Rosati suffocated to death after injecting her with heroin. Rosati argued Francesca was a depressed, suicidal drug user who suffered a cardiac arrest from a self-inflicted heroin injection. Rosati claimed he revived Francesca through physically strenuous CPR and mouth-to-mouth resuscitation, then fell asleep, after which Francesca died of a heroin overdose.

All the challenged photos were relevant and more probative than prejudicial given the disputed issues. The photos of Francesca in life were relevant to show her physical condition and general good health, rebutting Rosati’s claim that she was a drug abuser. The photos need not conclusively show good health, but only be relevant on that issue, to be properly admitted. We reject Rosati’s contrary suggestion.

The autopsy photo showed a detailed view of the tissue which was damaged during suffocation, rebutting Rosati’s claim that the damage resulted from his vigorous resuscitation. The degree, extent, and cause of the damage were the crucial forensic evidence on the disputed trial issue.

The crime-scene photos showed Francesca's body at various angles, including Rosati's initials carved into her buttocks, the absence of blood, the marks the prosecution experts opined were injection sites in Francesca's buttocks, and the body's position and lack of signs of trauma. All those factors were highly relevant to disputed issues.

Finally, the photos developed from the camera found at the crime scene were highly relevant to Rosati's intent. The prosecution argued the photos were taken after death, showing Rosati degrading Francesca, thus supporting the theory of an intentional, deliberate, and malicious killing. Although Rosati claimed the photos were taken when Francesca was alive and showed the couple in what he argued was playful sexuality, that dispute was a factual one for the jury to resolve.

The autopsy and crime scene photos were no more graphic than many other similar photos. The life photos illustrated the close relationship between Francesca and Thomas, about which there was much testimony. The photos from the camera were no more inflammatory than the crime scene photos and testimony which disclosed the damage to Francesca's vaginal area.

IV

Regarding proximate cause, over Rosati's objection, the trial court instructed the jury pursuant to CALJIC Nos. 8.55 and 8.58 as follows: "To constitute murder there must be, in addition to the death of a human being, an unlawful act which was a cause of that death." (CALJIC No. 8.55.) "If a person unlawfully inflicts a physical injury upon another person and that injury is a cause of the latter's death, that conduct constitutes an unlawful homicide even though the injury inflicted was not the only cause of the death. Moreover, that conduct constitutes unlawful homicide, even if: [¶] 1. The person injured had been already weakened by disease, injury, physical condition or other cause; or [¶]

2. It is probable that a person in sound physical condition injured in the same way would not have died from the injury; or [¶] 3. It is probable that the injury only hastened the death of the injured person; or [¶] 4. The injured person would have died soon thereafter from another cause or other causes.” (CALJIC No. 8.58.)

Although requested by the prosecution, the court refused to give CALJIC Nos. 3.40 and 3.41, the general instructions defining the “but for” definition of cause, and concurrent cause of death by more than one person.³ The court stated there was no evidence supporting a concurrent cause theory.

After extensive discussions, Judge Light instructed on neither voluntary nor involuntary manslaughter. Judge Light instructed the jury on intoxication only affecting the specific mental state of premeditation/deliberation. Finally, the trial court instructed the jury with CALJIC Nos. 2.50.02 (2000 rev.) regarding the domestic violence evidence, and 17.41.1 (1998 new) regarding reporting juror misconduct.

On appeal, Rosati challenges these instructional decisions. Rosati’s first three instructional error claims are related. Rosati claims there was sufficient evidence of different causes of Franceska’s death, his intoxication, and heat of passion/provocation to

³ CALJIC No. 3.40 contains several blanks, the first of which is to be filled in with the charged crime, and the rest of which are to be filled in with the result of the crime. As relevant to our case, the instruction would read: “To constitute the crime of murder there must be in addition to the death an unlawful act or omission which was a cause of that death. [¶] The criminal law has its own particular way of defining cause. A cause of the death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death and without which the act would not occur.”

As relevant to our case, with appropriate blanks filled in, CALJIC No. 3.41 states: “There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death. [¶] If you find that the defendant’s conduct was a cause of death to another person, then it is no defense that the conduct of some other person, even the deceased person, contributed to the death.” (Some bracketed material omitted.)

warrant additional instructions on proximate cause, the effect of his intoxication on malice as well as premeditation, and voluntary and involuntary manslaughter. Rosati also challenges the domestic violence and juror misconduct instructions. These challenges lack merit.

Regarding proximate cause, the evidence was that Francesca was suffocated to death. All the experts agreed that the amount of morphine in her system was potentially fatal. The prosecution experts opined that asphyxiation was the cause of death, and that the absence of edema ruled out a heroin overdose as a contributing cause of death. Rosati's experts said that in rare cases a heroin overdose can cause sudden fatal cardiac arrest and death without edema, and that, although less likely than suffocation, vigorous but unsuccessful CPR could have caused the chest and shoulder injuries Francesca's body displayed. However, Rosati testified he found Francesca without a pulse and respiration and successfully revived her before falling asleep, only discovering her dead after he awoke much later.

Thus, there was no evidence, let alone substantial evidence, that Rosati committed acts consistent with his experts' testimony that Francesca could have died from a self-inflicted heroin overdose causing sudden heart failure without edema, and that her injuries resulted from his unsuccessful resuscitation attempt. In order to reach such a conclusion, the jury would have had to accept Rosati's denials of injecting Francesca with heroin and suffocating her, but rejected Rosati's claim that he successfully revived her. If believed, Rosati did not commit any unlawful act which contributed to Francesca's death. At the same time, the jury would have had to reject what all the experts agreed was the most likely cause of death, asphyxiation, and accepted sudden heroin-caused heart failure as the cause of death. No rational jury could believe Rosati

accidentally suffocated Francesca while failing to revive her, because Rosati testified he did revive her. There was no evidence of an accidental suffocation. No rational jury could believe Francesca died from sudden heart failure caused by a heroin overdose, leaving little edema, because Rosati testified he successfully revived her. In order to shoehorn itself into the theory Rosati advances, the jury would have had to irrationally accept yet reject crucial parts of Rosati's testimony.

While trial courts must instruct the jury on all relevant theories, they need i nstruct only on theories that are supported by substantial evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) Here, the trial court erred in Rosati's favor by giving CALJIC Nos. 8.55 and 8.58. Rosati cannot complain because the trial court failed to give additional instructions to which he was not entitled. Our conclusion is reinforced by Rosati's objection to giving proximate cause instructions.

Likewise, Rosati was not entitled to voluntary intoxication instructions because there was no substantial evidence supporting them. Many cases affirm murder convictions and uphold trial courts' refusals to instruct on voluntary intoxication where, as here, the evidence of intoxication is insubstantial. While some of these cases discuss the now abolished diminished capacity defense, their analyses apply equally to claims that voluntary intoxication prevented formation of specific mental states. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1180-1181 [defendant claimed to have been drinking and been "high[]" during the crime, but seemed unaffected during it, and, like Smith, gave a detailed account of his conduct]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 762-763 [defendant's testimony, corroborated by his confederate, that he drank much alcohol, and took cocaine, over several hours preceding the crimes, and was under the influence of both, insufficient to warrant voluntary intoxication instructions, where he was not

incoherent and described his conduct]; *People v. Caldwell* (1984) 36 Cal.3d 210, 225 [testimony that after his arrest defendant was lethargic, sleepy, and appeared to be under the influence of PCP, insufficient to warrant voluntary intoxication instructions where he seemed calm and deliberate during the crime and answered post-arrest questions coherently; “[m]ere consumption of drugs is insufficient to establish [voluntary intoxication] . . . ; the evidence must demonstrate the effect of such consumption on the defendant. [Citations.] . . . A defendant’s actions may refute evidence of [voluntary intoxication.] [Citation.]”]; *People v. Harris* (1981) 28 Cal.3d 935, 958-959 [defendant’s post-arrest statement that he smoked marijuana and did not know what he was doing during the crime, even if not repudiated at trial, insufficient to warrant instructions absent expert testimony regarding its effect]; *People v. Price* (1929) 207 Cal. 131, 132-134 [extensive evidence of premeditation warranted rejection of intoxication instructions based on defendant’s claim that he was drinking shortly before the crime].)

Here, Rosati claimed only that he was a habitual addict, and used heroin many hours before Francesca’s death. This testimony, as a matter of law, did not support voluntary intoxication instructions. The trial court erred in Rosati’s favor in giving the instructions it did. The court did not err in failing to give additional instructions to which Rosati was not entitled.

Likewise, Rosati was not entitled to instructions that heat of passion/provocation could reduce his crime to voluntary manslaughter, or that he accidentally but criminally caused Francesca’s death, resulting in involuntary manslaughter. We have already noted there was no evidence that Rosati accidentally but unlawfully caused Francesca’s death.

As for heat of passion voluntary manslaughter, the trial court must instruct the jury on lesser included offenses sua sponte if substantial evidence would support a guilty

verdict of the lesser included crimes, even if the defendant objects or the lesser included offenses are inconsistent with his trial theory. (*People v. Barton, supra*, 12 Cal.4th at pp. 194-198.) In contrast, the trial court need only instruct on defenses sua sponte if they are supported by substantial evidence and are consistent with the defendant's case theory. Sudden quarrel/heat of passion voluntary manslaughter is a lesser-included offense of, not a defense to, murder. (*People v. Barton, supra*, 12 Cal.4th at pp. 199-201, disapproving language in *People v. Wickersham* (1982) 32 Cal.3d 307, 329, that unreasonable self defense voluntary manslaughter is a defense to, rather than a lesser included offense of murder.)

Defendants seeking to mitigate intentional killings from murder to heat of passion voluntary manslaughter must demonstrate provocation and heat of passion. To be entitled to voluntary manslaughter instructions under a heat of passion theory, "the killing must be 'upon a sudden quarrel or heat of passion' (§ 192); that is, 'suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.' [Citation.]" (*People v. Daniels* (1991) 52 Cal.3d 815, 868.) The jury also may consider the defendant's history as an abuse victim in deciding if there was provocation. (See *People v. Berry* (1976) 18 Cal.3d 509, 514-516, 518; *People v. Borchers* (1958) 50 Cal.2d 321, 328-330.)

Here, the only testimony was that the couple was verbally arguing when Thomas went to bed. There was no evidence of anything other than the couple's normal discord based on Francesca's disapproval of Rosati's continued drug use. Rosati did not testify to any conduct by Francesca that met the standard outlined above.

As given by the trial court, CALJIC No. 2.50.02 (2000 rev.) correctly tells the jury how to consider prior domestic violence evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922-925; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334-1337.) We reject Rosati's argument that we nonetheless should disapprove it.

In *People v. Engleman* (July 18, 2002, S086462) __Cal.4th __, the California Supreme Court declined to invalidate the "anti-nullification" instruction (CALJIC No. 17.41.1 (1998 New), but declared that it should not again be used.

In our case, the record contains nothing to show that the instruction played any part in the jury's deliberations. Defendant offers nothing to demonstrate that any juror, convinced of his guilt, would somehow have been provoked into nullification and then deterred by the instruction.

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL (Miriam A.), J.